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HAP SENG CREDIT SDN BHD v. ELEMAC PRECISION ENGINEERING SDN BHD

HIGH COURT MALAYA, MELAKA
ANSELM CHARLES FERNANDIS J
[ORIGINATING SUIT NO: MA-24FC-169-10-2023]
26 JUNE 2025

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Abstract – *An application for an order for sale under the National Land Code is premature and fundamentally flawed if it is filed before the expiry of the statutory period specified in a Form 16D notice. When a chargee issues a subsequent Form 16D notice, they are bound by the timeline stipulated therein, effectively superseding or estopping reliance on prior notices. The right to apply for an order for sale only accrues once the breach remains unremedied after the full statutory period has lapsed.*

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CIVIL PROCEDURE: *Originating summons – Order for sale – Land charged as security for banking facilities – Borrower defaulted in repayment – Chargee issued Form 16D notices – Originating summons filed before expiry of one-month remedy period – Which Form 16D notices to be relied on as basis for filing of originating summons – Whether application premature – Whether right to apply for order for sale accrued – Rules of Court 2012, O. 83*

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LAND LAW: *Charge – Order for sale – Application for – Land charged as security for banking facilities – Borrower defaulted in repayment – Chargee issued Form 16D notices – Originating summons filed before expiry of one-month remedy period – Which Form 16D notices to be relied on as basis for filing of originating summons – Whether application premature – Whether right to apply for order for sale accrued – Whether chargee estopped from relying on earlier Form 16D notice – National Land Code, ss. 254 & 256*

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The plaintiff, a licensed moneylender, had granted the borrower a term loan of RM10 million. The defendant also entered a specific deed of debenture with the plaintiff and the land belonging to the defendant was charged to the plaintiff as security for banking facilities granted to the borrower. The borrower, however, defaulted in the repayment of the instalments. Following the borrower's default, the plaintiff issued a notice of demand on 3 March 2023 for RM545,879.59. Upon the defendant's failure to pay, a first statutory Form 16D notice was issued on 4 March 2023 for RM6,417,859.66. When the breach remained unremedied, the plaintiff initiated High Court proceedings against the borrower on 29 March 2023 for RM6,469,329.51. Subsequently, a second 16D notice was issued on 25 September 2023 for RM6,842,831.83, which the defendant also failed to satisfy. Hence, the present originating summons ('OS') by the plaintiff for the

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sale of the land, pursuant to O. 83 of the Rules of Court 2012 ('encl. 1'). Objecting to encl. 1, the defendant argued that: (i) the filing of the OS was premature; (ii) there was non-compliance of the Moneylenders Act 1951 ('MLA'); (iii) the amount stated in the 16D notice was not lawfully due; and (iv) the plaintiff had charged compound interest contrary to the MLA.

Held (dismissing encl. 1):

(1) The charge on the land was registered in 2014. Pursuant to the charge, and because the borrower had defaulted in its payment in respect of the term loan facilities, the second 16D notice dated 27 September 2023 was sent to the defendant on 29 September 2023. It was received by the defendant on 4 October 2023. The last date for the defendant to comply with the 16D notice was on 4 November 2023. However, the present OS was filed on 30 October 2023. (paras 25 & 27)

(2) The plaintiff's affidavit clearly stated that: (i) it was relying on the second 16D notice as the basis of this OS; and (ii) the second 16D notice had been duly served on the defendant. Having discovered that the second 16D notice was premature, the plaintiff now made the assertion that the first 16D notice was the one to be relied on by this court as the defendant had not remedied the breach, as required in the first 16D notice. The plaintiff ought to be estopped from relying on the first 16D notice. The plaintiff's reliance on the first 16D notice was an afterthought. (paras 30, 34, 35 & 41)

(3) Once the second 16D notice had been served on the defendant, the parties were required to adhere to the terms of the second 16D notice, *ie*, the defendant was given the chance to remedy the breach within one month and the plaintiff was not to take any action until then. The terms of the second 16D notice incorporated and represented the existing obligations of the plaintiff and the defendant in respect of the charge. If, at the expiry of the period specified in the 16D notice the breach had not been remedied, it was only then that the whole sum secured by the charge shall become due and payable to the chargee; it was only on that date that the plaintiff's right to receive the money accrued. Consequently, the commencement of this OS, on 30 October 2023, was premature as the requisite one-month period to remedy the breach had not expired. (paras 36-38)

(4) On the premature issue alone, this OS ought to be dismissed as the plaintiff had acted contrary to ss. 254 and 256 of the National Land Code. The other issues, *ie*, in respect of the MLA and the calculation of interest, were not within the scope of an application for an order for sale as the cause of action here was *in rem* and not *in personam*. (paras 48 & 49)

Case(s) referred to:

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***

CIMB Bank Bhd v. Sivadevi Sivalingam [2020] 2 CLJ 151 FC ***(refd)***

Hap Seng Credit Sdn Bhd v. Rentak Arena (M) Sdn Bhd [2017] CLJU 1; [2017] 1 LNS 1 HC ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

OCBC Bank (Malaysia) Bhd v. Pentadbir Tanah Melaka Tengah [2023] CLJU 2699; [2023] 1 LNS 2699 HC ***(refd)***

Perbadanan Pengurusan Sunrise Garden Kondominium v. Sunway City (Penang) Sdn Bhd & Ors And Another Appeal [2023] 2 CLJ 333 FC ***(refd)***

Tengku Azman Tengku Adnan & Anor v. Hong Leong Bank Bhd [2014] CLJU 478; [2014] 1 LNS 478 CA ***(refd)***

United Overseas Bank (Malaysia) Bhd v. Sri Ram Sarma & Another Case [2020] CLJU 176; [2020] 1 LNS 176 HC ***(refd)***

Legislation referred to:

Companies Act 2016, s. 377(1)

Federal Constitution, art. 13

Interpretation Acts 1948 and 1967, s. 17A

Limitation Act 1953, s. 21(1)

Moneylenders (Control and Licensing) Regulations 2003, regs. 10, 11, Schedule K

Moneylenders Act 1951, ss. 2A(2), 10F, 10P(1), (3), 17

National Land Code, ss. 254, 256

Rules of Court 2012, O. 83

For the plaintiff - Manpal Singh & Helmi Zaharin; M/s Manjis Singh Sachdev, Mohammad Radzi & Partners

For the defendant - Amardas Jethanand; M/s K P Ng & Amardas

Reported by Najib Tamby

JUDGMENT

Anselm Charles Fernandis J:

Introduction

[1] The plaintiff (P) had applied by way of originating summons (OS) for an order for sale of land described as Geran No 50022, Lot No 458, Mukim Pekan Klebang, Seksyen III Daerah Melaka (encl. 1).

[2] The application was made under s. 256 of the National Land Code (NLC) and O. 83 of the Rules of Court 2012 (ROC 2012).

[3] The defendant (D) was the registered owner of the land. The land was charged to P as security for banking facilities granted to L and K Reality (the borrower).

[4] After going through the affidavits and submissions by the parties, I dismissed P's application with cost. P appealed against my decision.

[5] The parties will be known as they were in the High Court.

Brief Facts

[6] By letter of offer dated 11 June 2014, banking facilities were offered by P to the borrower. A facilities agreement dated 22 September 2014 was entered into where term loan of RM10,000,000 was granted by P to the borrower.

[7] The P was a licensed moneylender under the Moneylenders Act 1951 (MLA 1951) at the material time when the term loan was given to the borrower.

[8] D also entered a specific deed of debenture with P on 22 September 2014. The asset charged in respect of the said debenture was the land.

[9] Thereafter a third-party charge was also created where the land belonging to the D was charged to P. A Form 16A of the NLC dated 10 October 2014 was executed. The charge was duly registered on 16 October 2014. See encl. 2 exh. "PTT-3".

[10] The borrower however defaulted in the repayment of the instalments for the loan provided.

[11] This was followed by a notice of demand and termination which was sent to the borrower, the defendant and three other persons. They were required to pay for the arrears accrued under the facilities agreement. The total sum as at 3 March 2023 was RM545,879.59. D failed to pay the sum demanded.

[12] Shortly thereafter, P issued the statutory 16D notice *via* registered post to D ("the first 16D notice"). It was dated 6 March 2023. It stated that the amount owed was RM6,417,859.66 as at 4 March 2023. D failed to remedy the breach as required in this 16D notice.

[13] Later, a writ of summons and statement of claim dated 3 April 2023 was issued against the borrower and three others in the Kuala Lumpur High Court. The total amount claimed by P was RM6,469,329.51 as at 29 March 2023 together with interest at 8% annum from 30 March 2023. (See encl. 5 "PTT-5").

[14] In the meantime, P had appointed receivers and managers in respect of the borrower company pursuant to s. 377(1) of the Companies Act 2016. The notice of the appointment was dated 11 April 2023. (See encl. 2 exh. "PTT6").

[15] After that, two attempts were made by the receivers and managers to sell the land by way of private treaty but these attempts were not successful. The appointment of the receivers and manager was terminated. (See encl. 2 "PTT7").

[16] P issued a letter dated 27 September 2023 together with the second 16D notice of the same date ("the second 16D notice"). The second 16D notice stated that the amount owed by D to P as at 25 September 2023 was RM6,842,831.83. (See encl. 2. "PTT8").

[17] It also stated that there had been a breach of the loan facility. It required D to remedy the breach within one month of the receipt of the first 16D notice. It was received on 4 October 2023. D did not comply to the demand as stated therein.

[18] P then filed this OS on 30 October 2023 applying for the sale of the lands pursuant to O. 83 of the Rules of Court 2012.

The Defendant's Contention

[19] D raised several issues which, according to learned counsel for D, any one of these issues would result in a "cause to the contrary" sufficient to defeat this OS. These issues can be summed up as follows:

(i) the filing of the OS is premature;

(ii) non-compliance with the MLA;

(iii) the amount stated in the 16D notice was not lawfully due; and

(iv) P had charged compound interest contrary to the MLA.

The Law

[20] The relevant law in respect for an order for sale can be found in O. 83 of the ROC 2012 which states:

> 1. Application and interpretation (O. 83 r. 1)
>
> (1) This Order applies to any action (whether begun by writ or originating summons) by a chargee or chargor or by any person having the right to foreclose or redeem any charge, being an action in which there is a claim for any of the following reliefs:
>
> (a) payment of moneys secured by the charge;
>
> (b) sale of the charged property;
>
> (c) foreclosure;
>
> ...
>
> 2. ...

3. Action for delivery of possession or payment of moneys (O. 83 r. 3)

(1) The affidavit in support of the originating summons by which an action to which this rule applies is begun shall comply with the following provisions of this rule. This rule applies to a charge action begun by originating summons in which the plaintiff is the chargee and claims delivery of possession or payment of moneys secured by the charge or both.

(2) The affidavit shall exhibit a copy of the charge.

(3) Where the plaintiff claims delivery of possession the affidavit shall show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the particulars of the amount remaining due under the charge as at the hearing date of the originating summons.

[21] Order 83 of the ROC must be read together with ss. 254 and 256 of the NLC. For ease of reference, the sections are reproduced below:

254(1) Where, in the case of any charge, any such breach of agreement as is mentioned in subsection 253(1) has been continued for a period of at least one month or such alternative period as may be specified in the charge which shall not be less than one month, the chargee may serve on the chargor a notice in Form 16D:

(a) specifying the breach in question;

(b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge which shall not be less than one month; and

(c) warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.

(2) Where, after the service of any such notice, the charged land or lease becomes vested in any other person or body, the notice shall be as valid and effectual against that person or body as it was against the person or body on whom it was served.

(3) If at the expiry of the period specified in any such notice the breach in question has not been remedied:

(a) the whole sum secured by the charge shall (if it has not already done so) become due and payable to the chargee; and

(b) the chargee may apply for an order for sale in accordance with the following provisions of this Chapter:

Provided that paragraph (a) shall not apply to any charge to secure the payment of an annuity or other periodic sum.

[22] Section 256 of the NLC reads as follows:

> (1) This section applies to land held under:
>
> (a) Registry title;
>
> ....
>
> and to the whole of any undivided share in, or any lease of, any such land.
>
> (2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.
>
> (3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the **existence of cause to the contrary**.
>
> (emphasis added)

[23] *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 AMR 1036 is the *locus classicus* in respect of the explanation of s. 256 of the NLC. There the Supreme Court had extensively reviewed the various case law authorities and pronounced the following important principles of law which is relevant to this appeal. These are as follows:

> (a) The Court hearing an application under Section 256 NLC must bear in mind that the procedure under this statutory provision is meant to be speedy and summary in nature. The Court is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the NLC. He must next ensure that the procedural requirements prescribed by Order 83 of the Rules of Court 2012 have been complied with. Subsequently, the Court must deal with the very narrow question whether the material produced before the Court by the chargor constitutes "cause to the contrary". If the Court is satisfied on a careful and an objective assessment of the factual material made available before the Court that the chargor has shown cause to the contrary, the Court will refuse an order for sale. On the other hand, if the Court rules that the contentions by the chargor do not constitute cause to the contrary, the Court will pronounce as such, with reasons, and grant the chargee's application.
>
> (b) The concept of "cause to the contrary" within Section 256(3) may be established only in three categories of cases, namely by the charger demonstrating that:
>
> (i) his case falls within any of the exceptions to the indefeasibility doctrine embodied in s. 340 of the NLC;
>
> (ii) the chargee has failed to meet the conditions precedent for the making of an application for an order for sale, such as the failure to prove the making of a demand or service upon the chargor of a notice in Form 16D; and

(iii) the granting of the order for sale would be contrary to some rule of law or equity.

(c) **In the absence of such strong and compelling reasons, a Court would not be justified in withholding relief to a chargee under Section 256 of the NLC**. To act otherwise would be to ignore the mandatory language of Section 256(3) read with Section 340(1).

(d) Unless a chargor can bring himself within one of the three categories of case.

(emphasis added)

[24] As to the nature of an application for an order for sale the Supreme Court states:

As earlier observed, unless a chargor can bring himself within one of the three categories of cases set out earlier in this judgment, no cause to the contrary would be shown and the court will be obliged to make an order for sale. It would not be sufficient, as was done in the instant case, to allege mere breaches by the chargee of the loan agreement between the chargee and the borrower or even of the terms of the annexure to the charge in order to resist an application under s. 256(3) [NLC]. *An allegation that the chargee acted in breach of contract, while it may give rise to an independent action in personam, is insufficient per se to defeat the ad rem rights of a chargee under his registered charge to an order for sale*.

(emphasis added)

Findings Of The Court

Premature Issue

[25] The charge on the land was registered in 2014. Pursuant to the charge and because the borrower had defaulted in its payment in respect of the term loan facility, the second 16D notice dated 27 September 2023 was sent to D on 29 September 2023. It was received by D on 4 October 2023. The rubber stamp on the envelope states the date of receipt as that.

[26] The second 16D notice was sent by mail. Clause 8 of the charge agreement would apply and accordingly "shall be deemed to have been given five days after posting or having been left with the postal authorities".

[27] D's contention was that the last date for D to comply with the 16D notice was on 4 November 2023. However, the present OS was filed on 30 October 2023.

[28] In P's affidavit in reply encl. 8 para. 10 had affirmed that the second 16D notice as shown in the affidavit in support encl. 2 exh. "PTT8" was sent in accordance with cls. 8.1 and 10.3 of the charge. The amount stated there was RM6,842,831.83.

[29] P denied that this action was premature, reference was made to P's affidavit at encl. 8 para. 10 where it was stated:

> 10. Penafian Defendan di kandungan perenggan 12 dan 13 Afidavit Bantahan, tersebut adalah dipertikaikan dan Defendan diletakkan di atas beban bukti yang kukuh y untuk membuktikan dakwaan kosong tersebut. Saya seterusnya dinasihati oleh Peguamcara Plaintif dan sesungguhnya menyatakan bahawa Notis Statutori Borang 16D tersebut dikeluarkan selaras dengan peruntukan Seksyen 254 Kanun Tanah Negara dan **Klausa 8.1 Lampiran Gadaian dan serahan yang dilakukan adalah mengikut terma-terma yang yang telah ditetapkan di Klausa 10.3 Lampiran Gadaian**. Kegagalan Defendan untuk memperincikan dakwaannya bahawa Borang 16D tersebut adalah cacat dan tidak boleh diterimapakai tanpa sebarang butiran kecacatan hanya dakwaan kosong yang tidak disokong oleh apa-apa keterangan.
>
> (emphasis added)

[30] From my reading of para. 10 above, P had clearly stated that it was relying on the second 16D notice as the – basis of this OS. It also states that the second 16D notice had been duly served on D according to cls. 8 and 10.3 of the charge which state:

> Clause 8.1:
>
> In the event of any breach by the Chargor of:
>
> (1) the covenant to pay under Article 3.1 then, but subject always to the terms and conditions contained in any written agreement of the Chargee to the contrary, it shall be lawful but not obligatory for the Chargee forthwith to give the statutory notice pursuant to the provisions of the National Land Code requiring the Chargor to remedy the breach within a period of seven (7) days from the date on which such statutory notice is served or deemed to be served under the provisions hereof, or
>
> (2) any of the agreements covenants terms stipulations and undertakings herein provided and on the part of the Chargor to be observed and performed (other than the covenant to pay under Article 3 March 1) occurring and continuing for a period of seven (7) days and and if such breach is capable of being remedied then, but subject always to the terms and conditions contained in any written agreement of the Chargee to the contrary, it shall be lawful but not obligatory for the Chargee forthwith to give the statutory notice pursuant to the provisions of the National Land Code requiring the Chargor to remedy the said breach within a period of seven (7) days.
>
> **Service of the statutory notice shall be effected in the manner provided in Article 10.3 hereof**.
>
> (emphasis added)

[31] Clause 8.1 must be read in the light of the National Land Code (Amendment) Act 2016 which states that the period for the chargor to remedy the breach shall not be less than one month. The amendment is retrospective. See *OCBC Bank (Malaysia) Bhd v. Pentadbir Tanah Melaka Tengah* [2023] CLJU 2699; [2023] 1 LNS 2699.

[32] The relevant part of cl. 10.3 states:

> Notice
>
> ...
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> ...
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> ...
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> (3) ... **Any notice, demand certificate, request or communication despatched by ordinary mail shall be deemed to have been given five (5) days after posting or having been left with the postal authorities**. Any notice, demand, certificate, request or communication sent by telex shall be deemed to have been given at the time of transmission and any notice, demand, certificate, request or communication sent by telegram or cable shall be deemed to have been given 24 hours after despatch. Any notice, demand, certificate, request or communication sent by teiex or telegram shall be subsequently confirmed by letter posted or delivered as soon as practicable thereafter.
>
> (emphasis added)

[33] P conceded that if the second 16D notice was premature the notice would be defective and cannot be the basis to grant the order for sale of the land. This was specifically stated in encl. 23 para. 7.24 of P's affidavit:

> 7.24. Kandungan perenggan 7.4 Afidavit Jawapan Defendan tersebut adalah dirujuk dan atas nasihat Peguamcara Plaintif, saya sesungguhnya percaya lalu menyatakan bahawa sekiranya Notis 16D bertarikh 27.09.2023 tersebut adalah pra-matang, maka ianya tidak boleh digunapakai untuk pemfailan tindakan ini. **Dalam keadaan demikian, Plaintif akan sandarkan tindakan halangtebus ini kepada Notis Statutori 16D 07.03.2023 dan bukannya kepada Notis Statutori 16D 27.09.2023**. Plaintif sesungguhnya telah pada 07.03.2023 mengiisukan Notis Statutori 16D yang pertama kepada Defendan. Saya sesungguhnya percaya Notis Statutori 16D 07.03.2023 tersebut adalah teratur menurut Seksyen 431(1)(d)(ii) dan 431(2) Kanun Tanah Negara.
>
> Sesalinan Notis Statutori 16D bertarikh 07.03.2023 dan Surat Akuan oleh Mohd Ali Bin Md Noh yang diikrarkan pada 10.03.2023 adalah diiampirkan disini secara kolektif dan ditandakan sebagai Ekshibit "PTT-14".
>
> (emphasis added)

[34] I find that having discovered that the second 16D notice was premature, P now makes the assertion that the first 16D notice dated 7 March 2023 is the one to be relied on by this court as D had not remedied the breach as required in the first 16D notice, I however note that for reasons best known to P it did not mention the first 16D notice until encl. 23 was filed.

[35] Learned counsel for P now claims that the second 16D notice was merely sent in "the abundance of caution". I am however unable to accept this assertion. As stated earlier the second 16D notice formed the basis of the present OS. In these circumstances, I am of the view that P ought to be estopped from relying on the first 16D notice.

[36] I am also of the view that that once the second 16D notice had been served on D, the parties are required to adhere to the terms of the second 16D notice, *ie*, D was given the chance to remedy the breach within one month and P was not to take any action until then.

[37] The terms of the second 16D notice incorporate and represent the existing obligations of P and D in respect of the charge. If at the expiry of the period specified in the 16D notice and the breach had not been remedied, it is only then that "the whole sum secured by the charge shall become due and payable to the charge". It is only on that date that P's right to receive the money accrued. See *CIMB Bank Bhd v. Sivadevi Sivalingam* [2020] 2 CLJ 151.

[38] Consequently, I find that the commencement of this OS on 30 October 2023 was premature as the requisite one-month period to remedy the breach had not expired. See *OCBC Bank (Malaysia) Bhd v. Pentadbir Tanah Melaka Tengah* (*supra*).

[39] I echo what was said by the High Court in *United Overseas Bank (Malaysia) Bhd v. Sri Ram Sarma & Another Case* [2020] CLJU 176; [2020] 1 LNS 176 where it was held that "... under the circumstances, there can be no doubt that the existence of **two Form 16D notices is in itself a cause to the contrary under limbs (b) and (c)** of the case of *Low Lee Lian* (*supra*) that would warrant a dismissal of the order for sale sought". (emphasis added)

[40] Consequently I find that a "cause to the contrary" had, been shown by D, as the chargor, that would relate to categories (ii) and (iii) of the three categories mentioned in in *Low Lee Lian* (*supra*).

[41] I am also of the view that P's reliance now on the first 16D notice was an afterthought. It was only after the premature nature of P's action was realised that P chose to resurrect the first 16D notice to save the situation.

[42] It is also obvious to me that P had, for all intent and purpose, elected to cease to rely on the first 16D notice and pursued their action on the land by enforcing the debenture and the appointment of managers and receivers. It is not in dispute also that attempts for the land to be sold by private treaty and tender exercise had failed.

[43] What prompted P in filing this present OS was the Supreme Court case of *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274 wherein the unlawfulness of P's action of attempting to sell the land outside the ambit of the NLC was made apparent to P by virtue of D's letter to Crowe Advisory dated 28 July 23 at PDF p. 42 encl. 9 letter from D. In *Kimlin Housing*, the Supreme Court held, *inter alia*:

> ..., the provisions of the Code setting out the rights and remedies of parties under a statutory charge over land comprised in Part XVI *are exhaustive and exclusive* and any attempt at contracting out of those rights, unless expressly provided for in the Code, would be void as being contrary to public policy.
>
> We are supported in this by the foilowing passages in Das on "*The Torrens System in Malaya*" at pp. 429-430:
>
> > *The specific provisions of the Code, where applicable, override the covenants between the parties. The method prescribed for sale is intended to be exclusive. The form of charge is purely statutory*. It no doubt permits the insertion of special covenants and powers limiting or enlarging the rights of the parties but not so as to authorise the chargee to deal with the title in a manner which is repugnant to the express provisions of the Code.
>
> We would, therefore, answer the first question of law posed above: *whether the Receivers and Managers were by virtue of the powers conferred upon them by the Debenture entitled to sell the charged lands without taking proceedings under the Code, to obtain a judicial sale? in the negative*, that is to say in favour of the Borrower Company.
>
> (emphasis added)

[44] P's premature action in filing this OS had the ultimate consequence of unlawfully depriving D of its property. In this regard, it is appropriate to refer to art. 13 of the Federal Constitution which reads:

> No person shall be deprived of property save in accordance with law.

[45] To stress on this point the High Court in *United Overseas Bank (Malaysia) Bhd v. Sri Ram Sarma & Another Case* (*supra*) made the following pertinent observation:

> The importance of the strict compliance of the provisions of the law in respect of matters involving an individual's right to his/her immovable property is well settled. Based on the principles are well-enunciated in the Court of Appeal case in *Kekatong Sdn Bhd v. Bank Bumiputra (M) Bhd* [1998] 2 CLJ 266; [1998] 2 MLJ 440 which states as follows:

A (1) The ownership of immovable property and all things appurtenant thereto is a very valuable right. It has been placed on a constitutional footing as a fundamental right by art. 13 of the Federal Constitution. Accordingly, any deprivation of immovable property must be in strict compliance of both substantial and procedural law.

B (2) The effect of an order for sale and the proceedings subsequent thereto, including the holding of a public auction, are designed to permanently deprive a registered proprietor of his land. It is therefore of utmost importance that such deprivation is undertaken in strict compliance of the law.

C (3) The provisions in the Code that govern the enforcement of registered charges exist not only as a means of a lender recovering his money but also for the protection of the chargor.

[46] Learned counsel for P referred to the case of *CIMB Bank Bhd v. Sivadevi Sivalingam* [2020] 2 CLJ 151 in support of the proposition that the cause of
D action arose from D's failure to remedy the breach in the first 16D notice. I am of the view that the facts in *Sivadevi Sivalingam* are vastly different from the present case. In that case, the Federal Court was concerned with s. 21(1) of the Limitation Act 1953. More importantly in that case there was no second 16D notice to contend with unlike the present case.

E **[47]** I also find that it was inconsequential that D had not paid anything towards the amount owed since the issuance of the first 16D notice. What was significant was that the second 16D notice had the legal effect of allowing him to remedy the breach before the statutory one month expired. P however cut short that statutory period by prematurely filing this OS.

F **[48]** I am of the considered view that on the premature issue alone this OS ought to be dismissed as P had acted contrary to ss. 254 and 256 of the NLC.

[49] As for the other issues contended, I agree with learned counsel for D that the other issues, *ie*, in respect of the MLA 1951 and related issues such
G as, *inter alia*, the format of the Schedule K and the calculation of interest are not within the scope of an application for an order for sale as the cause of action here is *in rem* and not *in personam*.

[50] In emphasising this point, I can do no better than to refer to what was stated in *Hap Seng Credit Sdn Bhd v. Rentak Arena (M) Sdn Bhd* [2017] CLJU
H 1; [2017] 1 LNS 1:

11. It is also to be noted that it is a daunting task for the defendant to object to the plaintiff's present OS. This is because an objection against the order for sale to be given in respect of foreclosure of a property on the ground of cause to the contrary under s. 256(3) of the NLC can only
I happen under three categories of cases as laid down by the Supreme Court's case of Low *Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77. The three categories are as follows:

(a) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the Code;

(b) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale and

(c) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

[12] More importantly the facts of this case are similar to the present case before this court where the relevant passage states:

> As earlier observed, unless a chargor can bring himself within one of the three categories of cases set out earlier in this judgment, no cause to the contrary would be shown and the court will be obliged to make an order for sale. It would not be sufficient, as was done in the instant case, to allege mere breaches by the chargee of the loan agreement between the chargee and the borrower or even of the terms of the annexure to the charge in order to resist an application under s. 256(3) of the Code. *An allegation that the chargee acted in breach of contract, while it may give rise to an independent action in personam, is insufficient per se to defeat the ad rem rights of a chargee under his registered charge to an order for sale*.
>
> We are conscious that the approach we have adopted results in a very narrow and restrictive interpretation of s. 256(3) of the Code. But there are good reasons of policy for such an interpretation, it must not be forgotten that in the ordinary way, banks and other financial institutions loan moneys deposited with them by their customers to a borrower on the faith of the security of a charge created over the landed property of the borrower, or as here, of a third party. In the event of a default by the borrower, the lending institution normally looks to early recovery of all or a substantial part of the money due to them from a sale of the security. If the courts of this country interpret the phrase 'cause to the contrary' appearing in s. 256(3) of the Code liberally, then, institutional lenders would lose confidence in their right to realize their security through an order for sale. Financial institutions would then become reluctant to lend money to bona fide entrepreneurs. Commerce would come to a standstill and the development of land and industries in this country which are largely dependent upon loans from banks would cease. No judgment of this court will be designed to produce such a consequence.

[13] In *Jigarla K Doshi @ Jigarla Kantilal Doshi v. Resolution Alliance Sdn Bhd & Anor* [2012] CLJU 811; [2012] 1 LNS 811; [2013] 3 MLJ 61, the Court of Appeal stated at p. 68 that:

> In a foreclosure action, claims of, *inter alia*, alleged breaches of contractual obligations or challenges on the calculation of interest under the loan agreement are not relevant. The court will only be concerned with the restrictive categories of 'cause to the contrary'

A as laid down in the case of *Low Lee Lian*. The alleged breaches and challenges are matters to be raised by the appellant in a separate civil suit.

(emphasis added)

[51] Nevertheless, for the sake of completeness I will also touch on these B other issues in relation to learned counsel for D's submission. I would be appropriate to state that from the onset I find that these issues do not raise any cause to the contrary.

Moneylenders Act 1951 And Other Issues

C **[52]** Learned counsel for D had contended that the agreement between P and the borrower was not in the prescribed form as required under s. 10P(1) and 10P(3) of the MLA 1951. It was contended that the statutory Schedule K as in the Moneylenders (Control and Licensing) Regulations 2003 (the Regulations) only consisted of five pages while the approved Schedule K had more than 98 pages. The approved Schedule K was therefore D contended to be a completely different document from what had been envisaged in the Regulations.

[53] Counsel for D further submitted that even if statutory Schedule K had been duly approved by the Minister, there were additions made by P to the E loan agreement in the present case which were not approved by the Registrar. Reference was made to the Seventh Schedule at encl. 2 pp. 111 and 112 of the loan agreement.

[54] Counsel for D further stressed that any exemption from complying with s. 10F of the MLA 1951 can only be made by the Minister and that any F exemption must to be gazetted by virtue of s. 2A(2) of the MLA 1951.

[55] For ease of reference, the relevant provisions of the MLA 1951 are reproduced below:

Section 10P

G (1) A licensee who intends to lend money to a borrower shall enter into a moneylending agreement with the borrower, and that agreement shall be in the prescribed form.

(2) ...

(3) Any moneylending agreement which does not comply with the H prescribed form shall be void and have no effect and shall not be enforceable.

[56] Regulation 10 states where a loan is a secured loan the loan agreement is to be in accordance with the prescribed form in Schedule K of the Regulations.

I

[57] The power to amend or vary Schedule K has been delegated to the Registrar of Moneylenders *via* reg. 11 of the Regulations which provides that:

> Notwithstanding regulation 10, where the Registrar is satisfied that owing to special circumstances or hardships or necessary compliance with any of the provisions in the moneylending agreement is impracticable or unnecessary he may, by a letter in writing waive, modify, change, alter, vary, add or omit such provisions.

[58] P relied on reg. 11 in respect of the loan agreement used by it. It had written to the Registrar in a letter dated 3 June 2004 enclosing the amended Schedule K. This can be seen at encl. 53 p. 7.

[59] The Registrar replied by letter dated 5 July 2004 approving the amendments made by P (the approved Schedule K). The reply from the Registrar is exhibited in encl. 23 p. 23. The contents of this letter are not disputed. The letter imposed two conditions in respect of the approval, *ie*, Schedule K was to be used only for loans above RM50,000. Secondly, any change in the "format" to Schedule K must be with the approval of the Registrar.

[60] I find that notwithstanding that in its statutory form Schedule K consisted only five pages there was nothing to limit the number of pages to only five before an approval can be given by the Registrar. In this respect, I am unable to accept learned counsel's submission that merely because the approved Schedule K contain more than five pages, it falls outside the scope of the MLA 1951 and was a different document completely.

[61] In coming to this finding, I observe that the discretionary powers of the Registrar in reg. 11 are very wide in that for a variety of reasons, as stated in reg. 11 the Registrar can "waive, modify, change, alter, vary, add or omit such provisions". The main factor here is that the Registrar had consented to the format as submitted by the borrower. The Registrar's decision to approve the amended Schedule K had never been challenged.

[62] I now consider whether the agreement between P and the borrower was void as there were alleged "additions" in the Seventh Schedule at pp. 111 and 112 encl. 2 which P contend were inserted without approval of the Registrar. In considering this issue, I bear in mind that P cannot make any amendment to the "format" or "pindaan terhadap format ..." as stated in the Registrar's letter of 5 July 2004.

[63] In perusing the "additions", I find that these additions are merely additions and does not constitute any change to the "format" or arrangement to the approved Schedule K.

[64] The format remained as it was in the approved Schedule K. In fact, the format of the approved Schedule K expressly provides for "Additional Covenants of the Borrower" to be inserted. I therefore find learned counsel's argument on this issue without merit.

Section 2A(2) and Regulation 11

[65] Still on the issue of the approved Schedule K, counsel for D further argued that s. 2A(2) of the MLA 1951 requires any "exemption" to the Schedule K necessitates the Minister's approval and has to be gazetted:

> Section 2A reads:
>
> (1) ...
>
> (2) The Minister may:
>
> (a) in consideration of the special circumstances relating to the nature of the business of any company, or the objects of any society, and its financial standing; and
>
> (b) if he is satisfied that it would not be contrary to the public interest to do so, by notification in the *Gazette* **exempt** such company or society from all or any of the provisions of this Act, and such exemption shall be granted for such duration as may be specified in the notification, and may be made subject to such limitations, restrictions or conditions as the Minister may specify in the notification.
>
> (emphasis added)

[66] I note that the word used in s. 2A(2) is "exempt" which in ordinary dictionary meaning would mean "not having to follow or do".

[67] While I agree with the submission by counsel for D that if ever there is a conflict between the MLA 1951 and the Regulations, the former will prevail, I however find that there is no conflict between reg. 11 and s. 2A(2) of the MLA 1951 in respect of the present case. I say so for the following reasons:

(i) section 2A(2) is concerned with the substantive powers of the Minister to "exempt" from the provisions of the MLA 1951 in respect of the "nature of the business of any company" or "the objects of any society" and its "financial standing";

(ii) regulation 11 on the other hand is specifically concerned with the form of "the moneylending agreement" which is in the format of Schedule K. The Registrar's powers are confined to "waive, modify, change, alter, vary, add or omit" the provisions in Schedule K. The Registrar certainly did not and cannot "exempt" P from applying for a moneylending licence. That would defeat the whole purpose of the MLA 1951 which is to control "the business of moneylending and the protection of borrowers of the monies lent";

(iii) I am also of the considered view that reg. 11 and s. 2A(2) two serve different purposes. Both provisions nevertheless must be read harmoniously and in the light of its respective purpose. This would be in line with s. 17A of the Interpretation Acts 1948 and 1967 which states:

> In the interpretation of a provision of an Act, a construction that would promote – the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

(iv) this purposive interpretation would give effect to the legislative intent in that provisions should not, as far as possible, be interpreted in a way that would contravene other provisions in the Act or any regulation made thereunder. The Act must be read holistically and its provisions read harmoniously. See: *Perbadanan Pengurusan Sunrise Garden Kondominium v. Sunway City (Penang) Sdn Bhd & Ors And Another Appeal* [2023] 2 CLJ 333.

[68] To conclude on this issue, I find that the approval by the Registrar for Schedule K was lawfully made under reg. 11, there was no necessity for the amendments to the Schedule K to be "exempted" by the Minister. Further the format of Schedule K remained intact as approved.

Compound Interest

[69] Counsel for D asserted that the interest charged by P for the loan was contrary to s. 17 of the MLA 1951 where the MLA 1951 prohibits compound interest.

[70] Learned counsel had referred to encl. 9 where at para. 7 had attempted to explain his contention that P had allegedly claimed compound interest. It was also claimed that P had manipulated the accounts.

[71] I find that D had failed to prove, on the balance of probabilities, that compound interest was being charged by P. P had explained in detail at encl. 23 p. 54 how the interest was calculated. Further, I am in agreement with learned counsel for P that in D's calculation in encl. 9, it did not take into consideration the fact that every payment received is first applied to the monthly interest accrued. The remaining amount will then be used to settle the principal.

Amount Claimed Not Lawfully Due

[72] D had made the assertion that the sum claimed in the first and second 16D notices was not lawfully due and this amounted to a "cause to the contrary".

[73] However, I find that this argument fails in the light of cl. 10.15 of the charge which states that a statement signed by any officer of P as to the total amount due will be binding on D save for any manifest error. Such statement can be found at encl. 2 exh. "PTT5" which showed that the "termination sum 29 March 2023" was RM6,469,329.51. An updated signed statement of the amount due and owing was also exhibited at encl. 23 exh. "PTT15".

[74] By the issuance of the statement under cl. 10.15 of the charge P is exempted from adducing proof of the amount claimed from the D. Further the cl. 10.15 effectively shifts the burden to D to show that there was "manifest error" in the amount in the statement. The statement is binding and conclusive against the D unless the defendants can show there is manifest error on the face of the statement. See Federal Court decision in *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544; [2006] 2 MLJ 685; *Tengku Azman Tengku Adnan & Anor v. Hong Leong Bank Bhd* [2014] CLJU 478; [2014] 1 LNS 478; [2015] 2 MLJ 139).

[75] I find that D had failed to show any "manifest error" on the face of the statements.

Conclusion

[76] In the upshot I find encl. 1 was commenced prematurely and therefore constitutes a "cause to the contrary" as envisioned in s. 256 of the NLC. I therefore dismiss encl. 1 with cost.